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CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs claims of immunity in civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, and 1607, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2013 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Service of Process

Section 1608(a) of the FSIA specifies the proper methods of service of process on a foreign state. Section 1608(b) similarly identifies the proper methods of service on agencies or instrumentalities of a foreign state.

On February 4, 2013, the United States filed a motion to clarify or vacate an order of the U.S. District Court for the Northern District of Georgia regarding service in a case brought against multiple defendants, including the Nigerian Embassy. *Ahmed v. Attorney General of the United States et al.*, No. 1:12-CV-0122-RLV (N.D. Ga.). The court had issued an order regarding service that did not distinguish the Nigerian Embassy from the other listed defendants, resulting in an attempt by the pro se plaintiff to address a service package to the Consulate General of Nigeria in New York for delivery by the U.S. Marshals Service. The United States sought clarification that the court's order did not require the Marshals Service to effect service of process on the Nigerian consulate or the defendant Embassy, and in the alternative sought vacatur of any such

requirement. Excerpts below are from the brief in support of the U.S. motion. The motion with supporting memorandum is available in full at www.state.gov/s/l/c8183.htm. On February 25, 2013, the court granted the motion for clarification, explaining that its previous order regarding service was not intended to require service on the Nigerian embassy or consulate.

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If the Court's prior order is, in fact, intended to require the Marshals Service to effect service on a Nigerian consulate or the Nigerian Embassy, the proper course is to vacate any portion of the order imposing such a requirement. Both domestic and international legal authorities compel the Court to vacate that service requirement.

First, the service requirement would be inconsistent with the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. Both the Consulate General of Nigeria and the Nigerian Embassy are considered foreign states, *see Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), and thus the exclusive procedures for effecting service of the summons and complaint are set forth in 28 U.S.C. § 1608(a).

The methods of service set forth in § 1608(a) are mandatory, require strict compliance, and cannot be replaced with other procedures. *See Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001) (concluding that "the provisions for service of process upon a foreign state . . . outlined in section 1608(a) can only be satisfied by strict compliance" and collecting cases holding the same); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (stating that the procedures of § 1608(a) are "exclusive" and that "strict adherence to the terms of 1608(a) is required"); *Finamar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 118 (S.D.N.Y. 1995) (discussing § 1608(a) and stating that "[w]hether or not respondent received actual notice of the suit is irrelevant when strict compliance is required").

Section 1608(a) sets forth four potential methods for service: (1) pursuant to a special arrangement between the parties; (2) in accordance with "an applicable international convention on service of judicial documents"; (3) if methods (1) or (2) are unavailable, then by "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned"; and (4) if service cannot be made within 30 days using method (3), then by: sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. 28 U.S.C. § 1608(1)-(4). These four methods are ordered hierarchically, and each is "available only if the previously enumerated options are in some way foreclosed." *Democratic Republic of Congo v. FG Hemisphere Assocs., LLC* 508 F.3d 1062, 1063 (D.C. Cir. 2007); *see also Magness*, 247 F.3d at 613.

As relevant here, none of the four methods of service permit the Marshals Service to deliver the summons and complaint directly to the Consulate General of Nigeria in New York, or for that matter to the Nigerian Embassy. An order requiring the Marshals Service to perform such an act would therefore be inconsistent with the FSIA, and even if followed would not result in either entity being a proper defendant before this Court. To avoid a conflict with domestic law, therefore, the Court should vacate any portion of its order requiring the Marshals Service to perform such service.

Moreover, any such service requirement would also be inconsistent with international law. Specifically, an order requiring the Marshals Service to deliver the summons and complaint to a Nigerian consulate would run contrary to the Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820 (entered into force with respect to the United States Dec. 13, 1972).

Under the VCCR, to which both the United States and Nigeria are parties, a country's consular premises are inviolable such that "[t]he authorities of the receiving State shall not enter … the consular premises" except with consent. *Id.* art. 31(2). Directing service of process on consular premises would be contrary to this inviolability. *See* Restatement (Third) of Foreign Relations Law § 466 note 2 (1987) ("Service of process at . . . consular premises is prohibited."); *see also Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012).

Under the VCCR, therefore, the Marshals Service cannot intrude upon the consular premises in an effort to effect service. *See also* VCCR art. 43(1) ("Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."). Any requirement that the Marshals Service deliver service of process to a Nigerian consulate should therefore be vacated.

International law would similarly prohibit the Marshals Service from effecting service on the Nigerian Embassy, which is the entity named as a defendant in Ahmed's complaint. The Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502 (entered into force with respect to the United States Dec. 13, 1972)—to which both the United States and Nigeria are parties—provides that "[t]he premises of the mission shall be inviolable." *See* Art. 22(1). Thus, a court order requiring service of legal documents upon an embassy conflicts with Article 22(1) of the VCDR. *See also Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law. The Vienna Convention on Diplomatic Relations …prohibits service on a diplomatic officer."). Any requirement to effect service on the Nigerian Embassy should therefore also be vacated.

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2. Execution of Judgments and Other Post-Judgment Actions

*a. Attachment of blocked assets under TRIA and the FSIA (*Heiser*)*

As discussed in *Digest 2012* at 305, the United States submitted statements of interest in separate proceedings brought by the same plaintiffs in U.S. district courts in the

District of Columbia and the Southern District of New York, attempting to execute on a judgment against Iran and Iranian entities. These filings were among several made in 2012 on the issue of whether attachment under the Terrorism Risk Insurance Act ("TRIA") and under sections 1610(g) and 1610(f)(1) of the FSIA is predicated on demonstrating an ownership interest by the terrorist party. After the district court in the District of Columbia agreed with the U.S. position that only assets which the terrorist party actually owns—not all assets that are blocked—may be attached, plaintiffs appealed. On March 11, 2013, the United States filed its *amicus* brief with the Court of Appeals for the District of Columbia. Excerpts from the U.S. *amicus* brief follow (with footnotes omitted). The brief is available in full at www.state.gov/s/l/c8183.htm. On November 19, 2013, the Court of Appeals issued its decision in the case, affirming the district court's holding that plaintiffs could not attach the contested accounts under either TRIA or the FSIA without an Iranian ownership interest in the accounts, and that Iran lacked an ownership interest in the accounts. *Heiser v. Iran*, 735 F.3d. 934 (D.C. Cir. 2013).

* * * *

A. 1. TRIA provides that "[n]otwithstanding any other provision of law," a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a).6 Thus, if plaintiffs could demonstrate that the funds in the intermediary banks' possession are the blocked assets "of Iran," or the blocked assets "of" one of its agencies or instrumentalities, plaintiffs would be able to attach the assets notwithstanding provisions of the Foreign Sovereign Immunities Act that might otherwise preclude such action.

Similarly, Section 1610(g) allows certain terrorism victims to attach "the property of a foreign state" subject to a judgment under 28 U.S.C. § 1605A, and "the property of an agency or instrumentality of such a state." 28 U.S.C. § 1610(g). Thus, as with TRIA, plaintiffs could pursue an attachment under this section if they could demonstrate that the targeted assets were "of Iran," or "of" one of its agencies or instrumentalities.

The district court found that neither Iran, nor any of the Iranian banks, owns the assets in question. The United States takes no position on the question of ownership.

Plaintiffs are wrong, however, insofar as they claim that they may attach the blocked assets even if they are not owned by Iran or its affiliated banks. Assets subject to OFAC blocking regulations are not, as plaintiffs urge, perforce within the scope of TRIA or Section 1610(g).

TRIA authorizes attachment against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). And Section 1610(g) similarly applies to the property "of" a foreign state or "of" its agency or instrumentality. See 28 U.S.C. § 1610(g). OFAC regulations, by contrast, typically contain far broader language. See, *e.g.*, 31 C.F.R. § 515.201 (Cuban Assets Control Regulations, which apply to property in which Cuba or a Cuban national has had "any interest of any nature whatsoever"); *id.* §§ 538.201, 538.307 (Sudan sanctions, which apply to property in which the Sudanese government has "an interest of any nature whatsoever"); id. §§ 595.201,

595.307 (Middle East terrorism sanctions, which apply to property in which various terrorist entities have "an interest of any nature whatsoever"). Congress was presumably aware of the language used in regulations like these, and there is no sound basis for amending the statute to supply the language that Congress omitted.

2. The assets "of" Iran are not naturally understood to include all assets in which Iran has "any interest of any nature whatsoever." The Supreme Court has repeatedly observed that the "'use of the word "of" denotes ownership.'" *Bd. of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *Stanford*, 131 S. Ct. at 2196 (describing *Flores–Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States" (internal quotation marks omitted)).

Applying that understanding to a disputed provision of patent law, the Court in *Stanford* concluded that "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "'invention of the contractor.'" 131 S. Ct. at 2196. In contrast, in *United States v. Rodgers*, 461 U.S. 677 (1983), the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest when the relevant statute permitted execution with respect to "any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest." 26 U.S.C. § 7403(a) (emphases added); see also *Rodgers*, 461 U.S. at 692-94.

The Court found it important that the statute explicitly applied not only to the property "of the delinquent," but also specifically referred to property in which the delinquent "has any right, title, or interest." See *Rodgers*, 461 U.S. at 692 (emphasis removed). TRIA and Section 1610(g) omit that additional phrase; the former only applies to the blocked assets "of" a terrorist party, see TRIA § 201(a), and the latter only applies to the property "of" a terrorist state, see 28 U.S.C. § 1610(g)(1).

Plaintiffs urge that the word "of" can have multiple meanings. They note, for example, that TRIA refers to an "agency or instrumentality of [a] terrorist party," TRIA § 201(a) (emphasis added), and observe that an agency or instrumentality need not be "owned" by the terrorist party. This misses the point of the Supreme Court's reasoning. The word "of" is a preposition whose meaning depends on context. Sovereigns do not own their agencies. They do, however, own assets, including deposited funds. TRIA and Section 1610(g) apply to bank funds that are owned by the sovereign (or its agency or instrumentality). But they do not purport to allow plaintiffs to attach assets that the terrorist party does not own in the first place.

Indeed, plaintiffs' reading would expand these statutes well beyond common law execution principles. It "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); see also id. at 702 (majority op.) (implicitly agreeing with this description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2012). Congress enacted TRIA and Section 1610(g) against the background of these principles, and the statutes should be interpreted consistent with those common-law precepts. See *Staples v. United States*, 511 U.S. 600, 605 (1994); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991).

3. Plaintiffs' reading would not further TRIA's aim of punishing terrorist entities or deterring future terrorism. Allowing the victims of terrorism to satisfy judgments against the

property of a terrorist party "impose[s] a heavy cost on those" who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). As Senator Harkin also observed, "making the state sponsors [of terrorism] actually lose" money helps deter future terrorist acts. *Ibid*. Paying judgments from assets that are not owned by the terrorist party, on the other hand, would not impose a similar cost on the terrorist party and might, indeed, permit a plaintiff to satisfy its judgment by attaching assets owned by a third party.

Plaintiffs offer no support for their assertion that TRIA (and Section 1610(g) by implication) incorporate language used in OFAC's 2001 Terrorism Asset Report, and thus should be given an identical interpretation. See Plaintiffs' Br. 22-26. Congress did not employ language used in the 2001 Report: the phrase "blocked assets of" does not appear in the report at all. See JA 366-378. And plaintiffs are on no firmer ground in noting that the Report uses "of" to refer to something other than ownership. The cited passages use the word "of" in distinguishing between entities to which assets are linked, not in defining the scope of interests in the assets. See, *e.g.*, JA 368-371 (section of the report discussing "assets of international terrorist organizations"); JA 371 (section of the report discussing "assets of the Taliban"); JA 371-373 (section of the report discussing "assets of state sponsors of terrorism").

4. Plaintiffs' interpretation of Section 1610(g) is also specifically in tension with that statute's legislative history. The conference committee report explained that Section 1610(g) applies to "any property in which the foreign state has a beneficial ownership." H.R. Rep. No. 110-477, at 1001 (2007) (conf. rep.) (emphasis added); accord id. (the provision "is written to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution" (emphasis added)). These references to "ownership" confirm that the use of language far narrower than that in OFAC blocking regulations was not inadvertent.

Furthermore, Section 1610(g)'s text only underscores plaintiffs' error in urging that they may attach any assets subject to a blocking sanction. Section 1610(g) makes no reference to "blocked assets" except to state that an OFAC blocking sanction does not render the assets "immune" from attachment and execution. 28 U.S.C. § 1610(g)(2).

* * * *

B. Plaintiffs rely heavily on arguments accepted by the district court in *Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 562-68 (S.D.N.Y. 2012), appeal docketed sub nom., *Estate of Fuller v. Banco Santander, S.A.*, Nos. 12-1264, 12-1272, 12-1384, 12-1386, 12-1463, 12-1466 & 12-1945 (2d Cir.), and *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 529-41 (S.D.N.Y. 2010). Those arguments cannot be squared with the language in TRIA (the statute before the *Hausler* court) or in Section 1610(g) (which was not before that court), and another district court in the Southern District of New York correctly rejected *Hausler*'s reasoning. See *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 399-405 (S.D.N.Y. 2011), appeal docketed, No. 12-75 (2d Cir.).

The district court in *Hausler* fundamentally misunderstood the relationship between OFAC sanctions regimes and existing sources of property law, declaring that OFAC's regulations "are plainly intended to broadly demarcate the scope of and establish [a targeted entity's] interests in specified assets, not to attach consequences to property interests defined elsewhere." *Hausler*, 740 F. Supp. 2d at 532; see also Heisers' Br. 19 (repeating that assertion). OFAC's regulations do not attempt to define whether particular assets are "of" or "owned by" a terrorist party. They define terms such as "property" and "interest," see, e.g., 31 C.F.R. §§

544.305, 544.308, to demarcate the scope of OFAC's blocking sanctions, which incontrovertibly extend beyond assets owned by the relevant sanctions target. See, *e.g.*, *id*. § 515.201(b)(2) (barring transactions in "property" in which Cuba or one of its nationals has had an "interest"); *id*. §§ 544.201(a), 544.305, 594.201(a), 594.306 (barring transactions in "property" in which a designated entity has "an interest of any nature whatsoever").

The *Hausler* district court mistakenly justified its holding on the ground that its approach would provide a uniform definition of assets subject to attachment, and would make it unnecessary to look to definitions of property interests that might vary from state to state. *Hausler*, 845 F. Supp. 2d at 563-64. But if an attachment statute like TRIA or Section 1610(g) preempted state law (as the district court in *Hausler* believed), and if uniformity were deemed essential, courts could achieve that uniformity by developing a federal law understanding of ownership, akin to federal common law. See, *e.g.*, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (where Congress instructed that Title VII was to incorporate agency law principles, "a uniform and predictable standard must be established as a matter of federal law"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (in construing a federal statute that used common law terms, court relied on "general common law of agency, rather than on the law of any particular State"). Indeed, the district court in this case took essentially that approach. A court should not, however, in the interests of uniformity, insist that OFAC regulations define the scope of TRIA or Section 1610(g).

* * * *

b. Discovery to aid in execution under the FSIA

(1) Discovery regarding central bank accounts

Section 1611(b)(1) of the FSIA provides:

> Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

On May 17, 2013, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit in support of reversal of a district court order permitting discovery concerning, inter alia, U.S. bank accounts held by the Lao Central Bank. *Thai-Lao Lignite and Hongsa Lignite v. Government of the Lao People's Democratic Republic et al.*, No. 13-495 (2d Cir. 2013). The case arises from efforts by two foreign corporations to satisfy a foreign arbitral award against the Lao Government that was previously confirmed by the district court. The U.S. *amicus* brief explains the United

States' interest in protecting foreign governments from intrusive discovery targeted at central bank accounts given the many foreign central banks that hold reserves in accounts in the United States. The section of the U.S. *amicus* brief that follows (with citations to the record omitted) argues that the Lao Central Bank's accounts are protected from discovery by Section 1611(b)(1) of the FSIA. Another section of the brief, relating to the immunity of the Lao government's diplomatic accounts and diplomatic personnel, is discussed in section D.3., *infra.* The full text of the U.S. brief is available at www.state.gov/s/l/c8183.htm.

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FSIA Section 1611(b)(1) Protects the Lao Central Bank's Accounts From Discovery

The FSIA, which establishes a comprehensive and exclusive scheme for obtaining and enforcing judgments against a foreign state in civil cases in U.S. courts, *see generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989), includes a specific provision immunizing foreign central banks from attachment and execution. Section 1611(b)(1) of the FSIA provides that "the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account." This provision recognizes that "foreign central banks are not treated as generic agencies and instrumentalities of a foreign state under the FSIA; they are given special protections befitting the particular sovereign interest in preventing the attachment and execution of central bank property." *NML Capital*, 652 F.3d at 188 (citation and internal quotation marks omitted). Furthermore, this Court has acknowledged that this protection extends to discovery. *Id.* at 194 ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."). The district court's February 11, 2013 order misapplies *NML Capital*, and fails to recognize the special protection due the Lao Central Bank under § 1611(b)(1).

In *NML Capital*, this Court made three holdings with respect to central bank immunity under the FSIA. First, it held that "the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state…." *Id.* at 187-88. Second, it determined that "the plain language of the statute suggests that Congress recognized that the property of a central bank, immune under § 1611, might *also* be the property of that central bank's parent state." *Id.* at 188-89 (emphasis in original); *accord id.* at 189 (" 'By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.' " (quoting *amicus* brief filed by the United States)). Third, the Court concluded that the phrase "held for its own account" in § 1611(b)(1) describes funds used for traditional central banking functions. *Id.* at 194. Recognizing that the immunity conferred by § 1611(b)(1) includes immunity "from the costs, in time and expense, and other disruptions attendant to litigation," the Court adopted a test whereby funds held in an account in the name of a central bank are presumed to be immune from

attachment absent a specific showing by the judgment creditor that the funds "are not being used for central banking functions as such functions are normally understood." *Id.*

Here, the district court improperly ordered discovery concerning the Lao Central Bank's U.S. accounts. The district court determined that the Lao Central Bank had provided "ample statutory evidence" that it was a separate entity (with a separate claim to sovereign immunity) from the Lao Government, and that unlike the Lao Government, the Lao Central Bank had not waived its immunity. The district court further determined that it had "not established jurisdiction over the Lao [Central] Bank as a separate entity." Moreover, the district court acknowledged "that specific details of accounts held by the Lao [Central] Bank are immune from discovery as well as attachment." And lastly, the district court recognized that in order to rebut the presumption that the Lao Central Bank's accounts are immune under FSIA § 1611, Thai-Lao and Hongsa must "show, with specificity, 'that the funds are not being used for central banking functions as such functions are normally understood.' " (quoting *NML Capital*, 652 F.3d at 194)).

Yet despite these observations, the district court concluded that petitioners were entitled to discovery because the Lao Central Bank "[did] not conclusively establish that these accounts are the Lao [Central] Bank's property, and not [the Lao Government's]," pointing to a Lao law that it characterized as requiring the Lao Central Bank "to act as a custodian for the Lao Government's assets abroad." On this basis, the district court concluded that "Petitioners are thus entitled to discovery regarding [the Lao Government's] accounts, even though they may be held in the name of the Lao [Central] Bank."

The district court's ruling misapplied *NML Capital* by focusing on whether the Lao Central Bank accounts belonged to the Lao Central Bank or the Lao Government, a question that this Court has made clear is irrelevant to § 1611(b)(1) immunity determinations. *NML Capital*, 652 F.3d at 189. As this Court stated in *NML Capital*, the FSIA recognizes that central bank funds will often also be the property of the foreign state. *Id.* Furthermore, the Declaration of Oth Phonhxiengdy, Deputy Director General of the Lao Central Bank's Banking Operations Department ("Oth Declaration"), made clear that the Lao Central Bank's accounts in the United States are held in its own name, rather than the Lao Government's. Thus, applying the test set forth in *NML Capital*, the funds in the Lao Central Bank accounts are "presumed to be immune from attachment under § 1611(b)(1)." 652 F.3d at 194. Thai-Lao and Hongsa could rebut this presumption only "by demonstrating with specificity" that the funds in question were "not being used for central banking functions as such functions are normally understood." *Id.*

Thai-Lao and Hongsa provided no "specific showing" of facts that would provide a basis to rebut this presumption. To the contrary, the Oth Declaration provides further support for the presumption that funds in the Lao Central Bank account are in fact being used for central banking functions. The Oth Declaration explained that the Lao Central Bank is authorized to engage in traditional central banking functions, including issuing legal tender and regulating the money supply, holding and managing foreign currency reserves, acting as a lender of last resort, and serving as the Lao Government's agent in dealing with international financial institutions such as the International Monetary Fund. Furthermore, and in particular, the Oth Declaration clarified that the Lao law cited by the district court merely establishes that the Lao Central Bank holds the Lao Government's foreign currency reserves—a paradigmatic traditional central banking function. *See NML Capital*, 652 F. 3d at 195 (noting that the accumulation of foreign exchange reserves is a "paradigmatic central banking function[ ]"); *accord Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113

(S.D.N.Y. 1993) ("When the central bank acts as a bank for its parent foreign state…, it is engaged in a central banking and governmental function."). By failing to accord the Lao Central Bank a presumption of immunity, and allowing discovery to proceed despite the absence of any evidence that the funds at issue were not used for central banking functions, the district court incorrectly applied § 1611(b)(1).

It is critically important that district courts properly apply this Court's test with respect to the immunity of foreign central banks under § 1611(b)(1). The United States has an interest both in promoting reciprocal international principles of central bank immunity to ensure that U.S. reserves held by the Federal Reserve abroad receive adequate protection, and also in protecting foreign central banks engaged in central banking activities from interference by unwarranted litigation in U.S. courts. Many foreign central banks choose to hold their reserves in dollar-denominated assets in accounts in the United States. Foreign central banks invest their reserves in the United States because of the stability of the U.S. dollar, the unparalleled depth and liquidity of our financial markets, and the reliability of our political and judicial institutions. Equally critical has been the assurance long provided by United States law that central bank funds held in this country and used for traditional central banking functions are immune from attachment, save for very narrow exceptions, and not subject to discovery. If this traditional immunity is weakened through a misinterpretation of the FSIA and misapplication of this Court's binding precedent, foreign central banks might be led to withdraw their reserves from the United States and place them in other countries, and the preeminence of the U.S. dollar as a reserve currency could be jeopardized. *See generally* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 265-71 (1982); *see also* H.R. Rep. No. 94-1487, at 25 (explaining that the purpose of FSIA § 1611 is to protect the "funds of a foreign central bank . . . deposited in the United States," because "execution against the reserves of a foreign state could cause significant foreign relations problems"). Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system.

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(2) Discovery regarding sovereign assets outside the United States

On December 4, 2013, the United States filed a brief as *amicus curiae* in support of the petition for writ of certiorari filed in *Argentina v. NML Capital, Ltd.*, No. 12-842. For background on the case, see *Digest 2012* at 315-19. The U.S. brief was filed in response to a Court order inviting the United States' views, and it urges the Court to grant review of a decision by the U.S. Court of Appeals for the Second Circuit that permitted blanket discovery into a foreign state's assets located outside the United States, even though such property could not be attached or executed upon by the district court, or any United States court, under the FSIA. The brief argues that the Court of Appeals also erred in holding that the fact that the discovery was directed to third parties eliminated any sovereign immunity concerns. The U.S. brief identifies a circuit conflict between the Second Circuit's decision and the Seventh Circuit's holding in *Rubin v. Iran* (discussed in *Digest 2011* at 318-21), notes that the issues are important and recurring, and asserts

that the Court of Appeals' decision raises foreign policy concerns for the United States. Excerpts follow from the U.S. *amicus* brief, which is available in full at www.state.gov/s/l/c8183.htm.

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1. The FSIA codifies, with some modifications, long-recognized foreign sovereign-immunity principles by establishing two general rules of immunity. First, a foreign state is immune from the jurisdiction of the court unless an enumerated exception to immunity applies. See 28 U.S.C. 1604, 1605, 1605A, 1607 (2006 & Supp. V 2011). Second, the property of a foreign state is immune from attachment and execution unless an exception to that immunity applies. 28 U.S.C. 1609-1611 (2006 & Supp. V 2011).

Consistent with pre-FSIA practice, under which foreign state property was absolutely immune from execution even if the sovereign had been held to be subject to suit, the exceptions to attachment immunity are narrower than, and independent of, the exceptions to jurisdictional immunity. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012); see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010). Even when the foreign state has been held subject to the court's jurisdiction under Sections 1605 through 1607, the "property in the United States of a foreign state," 28 U.S.C. 1609, is immune unless it is "used for a commercial activity in the United States" and certain other conditions are satisfied, 28 U.S.C. 1610(a) (Supp. V 2011). See *Walters v. Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011).

Because the FSIA expressly provides that a foreign state's property is immune under Section 1609 absent an applicable exception, see *Peterson*, 627 F.3d at 1127-1128, a judgment creditor seeking to enforce a judgment against the property of a foreign sovereign bears the burden of identifying the property to be executed upon and proving that it falls within an exception to immunity from execution. See, *e.g.*, *Walters*, 651 F.3d at 297; *Rubin*, 637 F.3d at 796; *Walker Int'l Holdings Ltd. v. Congo*, 395 F.3d 229, 233 (5th Cir. 2004), cert. denied, 544 U.S. 975 (2005).

2. When the availability of an asset for execution turns on factual issues, a judgment creditor may seek discovery to develop facts establishing that the property is subject to execution under the FSIA. Although the FSIA does not expressly address the permissible scope of discovery under these circumstances, see *House Report* 23, a district court ordering discovery should not proceed as though only private interests were implicated, but should instead tailor discovery in a manner that respects the general rule of immunity Congress established in Section 1609.

The presumptive immunity in the FSIA protects foreign sovereigns not only from liability or seizure of their property, but also from "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd. v. Republic of Arg.*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert, denied, 552 U.S. 818 (2007); *Rubin*, 637 F.3d at 796-797; *Peterson*, 67 F.3d at 1127 (similar). To permit burdensome and intrusive discovery into the property of a foreign state, without regard to whether that property could be subject to execution under the FSIA, would be inconsistent with both the FSIA's protections and the comity principles the statute implements. See *Rubin*, 637 F.3d at 795-797. The court of appeals was therefore wrong to

conclude that "because the district court ordered only discovery, not the attachment of sovereign property, *** Argentina's sovereign immunity is not affected." Pet.App.3.

The court of appeals made a similar error in reasoning (Pet. App. 18) that once the district court "had subject matter *** jurisdiction over Argentina," it could order discovery in aid of execution "as over any other party." The FSIA unambiguously provides that even when a foreign state is subject to suit, its property remains immune from attachment or execution except as specifically provided in Sections 1610 and 1611. 28 U.S.C. 1609. Congress thus provided foreign states with an independent entitlement to immunity in connection with litigation to enforce a judgment, even if they are subject to the court's jurisdiction - and attendant discovery - for purposes of adjudicating the merits of the underlying suit. See *Peterson*, 627 F.3d at 1127-1128.

Discovery in aid of execution accordingly should be conducted in a manner that respects the comity and reciprocity principles that the FSIA was enacted to implement and safeguard. See *Peterson*, 627 F.3d at 1127-1128; cf. *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955). This Court has long recognized that "[t]he judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity and may … affect our relations with it" at least to the same extent as subjecting a foreign state to suit. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (citation and internal quotation marks omitted; brackets in original). Similarly here, permitting extensive discovery in aid of execution, irrespective of whether any specified property may actually be subject to attachment, could impose significant burdens on the foreign state and impugn its dignity, which could harm the United States' foreign relations.

Such discovery could also lead to reciprocal adverse treatment of the United States in foreign courts. The United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad. Cf. *Boos v. Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of the "concept of reciprocity" in international law); *McCulloch v. Sociedad National de Marineros de Hond.*, 372 U.S. 10, 21 (1963).

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B. The Court Of Appeals Erred In Upholding The District Court's Discovery Order

1. Consistent with the principles discussed above, a district court presented with a discovery request concerning foreign-state property must consider the judgment creditor's interest in discovery in the context of the foreign state's "legitimate claim to immunity," *EM Ltd.*, 473 F.3d at 486, and the principles of comity and reciprocity reflected in the FSIA. Specifically, the court should require the judgment creditor to demonstrate that the proposed discovery is directed toward assets for which there exists a reasonable basis to believe that an exception to immunity applies and that the court would have authority to order execution on the assets. Thus, as most courts of appeals to have addressed the question have held, discovery concerning a foreign state's assets "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Rubin*, 637 F.3d at 796 (quoting *EM Ltd.*, 473 F.3d at 486); see *Connecticut Bank of Commerce v. Congo*, 309 F.3d 240,

260 n.10 (5th Cir. 2002); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007).

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B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity post-*Samantar*.

2. *Samantar v. Yousuf*

After the Supreme Court decided the issue of applicability of the FSIA to foreign official immunity in *Samantar* in 2010, the case was remanded to the district court. The United States filed a statement of interest in the district court concluding that petitioner was not immune. See *Digest 2011* at 338-40. Samantar appealed the district court's denial of his motion to dismiss and the United States submitted an *amicus* brief in the U.S. Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed, but on grounds that differed from those relied on by the district court and in a manner that conflicted with the principles articulated by the United State in its submissions. In addition, in January 2013, the United States recognized a government of Somalia for the first time since 1991. See Chapter 9.B.1. On December 10, 2013, the United States filed an *amicus* brief in the case after Samantar petitioned for certiorari in the U.S. Supreme Court. The U.S. *amicus* brief is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.[*]

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2. The court of appeals sought to draw a distinction between Executive Branch determinations of status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations of conduct-based immunities, which the court considered itself free to second-guess. That distinction has no basis.

a. As an initial matter, this Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the

[*] Editor's note: On January 14, 2014, the Supreme Court denied the petition for certiorari.

Samantar Court recognized that the same procedures applied in cases involving foreign officials. 130 S. Ct. at 2284-2285. Indeed, the two cases cited by this Court involving foreign officials—*Heaney* and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see 130 S. Ct. at 2290.

b. In concluding that conduct-based immunity determinations are not binding on the judiciary, the court of appeals relied on two law review articles for the proposition that the Executive's determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive's conduct-based determinations are not grounded on a similar "constitutional basis." Pet. App. 16a-17a. But this Court has long recognized that the Executive's authority to make, and the requirement of judicial deference to, foreign sovereign immunity determinations flow from the Executive's constitutional responsibility for conducting the Nation's foreign relations, not the more specific recognition power. See, *e.g.*, *Ex Parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); *Hoffman*, 324 U.S. at 34 (stating that courts will "surrender[]" jurisdiction upon a suggestion of immunity "by the political branch of the government charged with the conduct of foreign affairs"); *Lee*, 106 U.S. at 209 ("[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."); see also *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-361 (1955) (stating that "[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit," and that "the rule enunciated in The Schooner Exchange" rests on the need to avoid interfering in the Executive's conduct of foreign relations).

The Executive's authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign state and foreign official immunity is not invariably coextensive, see 130 S. Ct. at 2290, the basis for recognizing the immunity of current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd,* 168 U.S. 250 (1897); see also Pet. App. 40a-41a. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other Nations' sovereignty as suits against foreign states. See *ibid*.; *Heaney*, 445 F.2d at 503 (same).

c. Accordingly, in the years before the FSIA, courts routinely deferred to Executive Branch determinations of conduct-based immunity of both foreign states and foreign officials. Because the Executive Branch applied the restrictive theory of sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity, 130 S. Ct. at 2285, determinations of foreign state immunity were conduct-based, and courts deferred to the Executive's decisions. See, *e.g.*, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971); Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.) (affirming denial of immunity based on Executive Branch's conclusion that

acts in question were "private acts"), cert. denied, 385 U.S. 931 (1966); *Amkor Corp. v. Bank of Korea*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969) (holding that Executive's conclusion that Bank of Korea was engaged in commercial activities was "binding on this Court"). In the relatively few cases involving foreign officials, moreover, courts also followed the "same two-step procedure" as in cases involving foreign states. 130 S. Ct. at 2284-2885 (citing *Heaney* and *Waltier*).

That deferential judicial posture as to both conduct-based and status-based immunity determinations is based in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). As this Court recognized in this case, the Executive Branch's constitutional authority over the conduct of foreign affairs continues as a foundation for the Executive's authority to determine the immunity of foreign officials. 130 S. Ct. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."); see *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning to the Constitution.") (citation and internal quotation marks omitted). In the absence of a governing statute (such as the FSIA), it continues to be the Executive Branch's role to determine the principles governing foreign official immunity from suit. See, *e.g.*, *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). The court of appeals therefore erred in holding that the Executive Branch's determinations of conduct-based immunity are not entitled to controlling weight.

B. The Court Of Appeals Erred In Creating A New Categorical Judicial Exception To Immunity

The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific ground set forth in the Executive Branch's Statement of Interest, which turned on the unique circumstances of this case, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.

The per se rule of non-immunity adopted by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically requested the court not to address respondents' broader argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. Pet. App. 68a n.3. The court of appeals' decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." Hoffman, 324 U.S. at 35-36.

Indeed, both before and after this Court's decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004) (suggestion of immunity on behalf of then-President Zemin of China in district court; after he left his position as head of state, the United States continued to recognize his immunity); see also Suggestion of Immunity Submitted by the U.S. at 6, *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn. Sept. 7, 2012); Statement of Interest and Suggestion of Immunity of and by the U.S. at 5-6, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011) (third-party testimony was sought from former Colombian President Uribe in a suit in which he was alleged to have committed jus cogens violations); Statement of Interest and Suggestion of Immunity at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP (E.D.N.Y. Dec. 17, 2012). The courts deferred to the United States' Suggestions of Immunity in these cases. *Matar v. Dichter*,

563 F.3d 9, 14-15 (2d Cir. 2009); *Ye*, 383 F.3d at 626-627; *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1637 (2013); Tr., *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn. July 18, 2013); *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP, 2013 WL 5502851, at *5-*7 (E.D.N.Y. Sept. 30, 2013).

Respondents erroneously assert (Br. in Opp. 17, 19-20) that the court of appeals' creation of a categorical exception to immunity whenever *jus cogens* violations are alleged is supported by the United States' amicus brief filed in this case when it was previously before the Court. See 08-1555 U.S. Amicus Br. 7, 24-26. Specifically, they contend that the United States stated that various factors, including the nature of the acts alleged, are "appropriate to take into account" in immunity determinations, and that courts (including the Fourth Circuit in this case) therefore are free to make immunity determinations on the basis of those factors. Br. in Opp. 19. That is incorrect.

The passages in the United States' brief in this Court identified considerations, not accounted for under the FSIA, that the Executive Branch could find it appropriate to take into account in making immunity determinations. The passages thereby served to underscore the range of discretion properly residing in the Executive Branch under the Constitution to make immunity determinations. The United States' brief in this Court did not state that the Executive Branch had in fact decided how or if any particular consideration should play a role in immunity determinations, much less suggest that a court should weigh those considerations (or invoke any one of them) to make a determination of immunity or non-immunity on its own. In any event, this Court unanimously ruled in this case that the courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before the enactment of the FSIA. The Executive Branch made a determination of immunity in this case. The court of appeals fundamentally erred in failing to rest on the United States' submission and instead itself announcing a categorical exception to official immunity whenever allegations of jus cogens violations are made. See *Hoffman*, 324 U.S. at 35 (It is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

II. THIS COURT SHOULD REMAND FOR FURTHER CONSIDERATION IN LIGHT OF CHANGED CIRCUMSTANCES

The court of appeals erred in two significant respects, and its decision conflicts with the Second Circuit's decision in *Matar v. Dichter*, *supra*, which held that courts must defer to the immunity determination in the Executive Branch's suggestion of immunity and sustained a suggestion of immunity in a case involving alleged violations of *jus cogens* norms. An appellate decision holding that courts need not defer to the Executive's immunity determination and announcing a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would warrant review by the Court at an appropriate time. In the view of the United States, however, it would be premature for this Court to grant plenary review at this time in light of significant developments that occurred after the lower courts' consideration of the case. The lower courts should have an opportunity to consider any further determination by the United States on the immunity issue in light of those developments and diplomatic discussions between the United States and the recently recognized Government of Somalia.

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3. President Zedillo of Mexico

As discussed in *Digest 2012* at 345-46, the United States filed a suggestion of immunity in a case brought against the former president of Mexico, Ernesto Zedillo Ponce de Leon, in U.S. district court in Connecticut. *Doe v. Zedillo*, No. 3:11-cv-01433. On July 18, 2013, the court ruled from the bench (without a written opinion) that the case should be dismissed, deferring to the U.S. suggestion of immunity.[**]

4. *Ahmed v. Magan*

In 2011, the United States filed a statement of interest (to the effect that defendant Magan was not immune) in this case alleging torture and indefinite detention against a former Somali security chief residing in the United States. See *Digest 2011* at 344. In 2012, the U.S. District Court for the Southern District of Ohio granted plaintiff's motion for summary judgment. See *Digest 2012* at 326. In 2013, a magistrate judge in the U.S. District Court for the Southern District of Ohio issued a report and recommendation, finding Magan liable under the Alien Tort Statute ("ATS") as well as the Torture Victim Protection Act ("TVPA"), and recommending a total of $5 million in compensatory damages and $10 million in punitive damages. The magistrate's report and recommendation is available at www.state.gov/s/l/c8183.htm. Defendant Magan failed to file any objection before the court-imposed deadline, thereby waiving review by the district court and any appeal. On October 2, 2013, the district court adopted the report and recommendation. *Ahmed v. Magan*, No. 2:10-00342 (S.D. Ohio 2013), slip opinion, 2013 WL 5493032.

5. *Rosenberg v. Lashkar-e-Taiba*

In this case, discussed in *Digest 2012* at 293-95 and 331-33, relatives of victims of the 2008 Mumbai terrorist attacks asserted that defendants, the Inter-Services Intelligence Directorate of Pakistan ("ISI") and its former directors, Ahmed Shuja Pasha and Nadeem Taj, were not entitled to immunity because they engaged in violations of *jus cogens* norms by providing support for acts of terrorism. The United States filed a statement of interest and suggestion of immunity in 2012. On September 30, 2013, the court issued its decision, dismissing the case as to the ISI, Pasha, and Taj for lack of jurisdiction based on their immunity. *Rosenberg et al. v. Lashkar-e-Taiba et al*., Nos. 10-05381, 10-05382, 10-05448, 11-03893, 12-05816 (E.D. N.Y. 2013). The court applied precedent in the Second Circuit, *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) in deferring to the Executive Branch's immunity determination. Excerpts from the court's opinion follow. Plaintiffs appealed the dismissal as to Pasha and Taj.

[**] Editor's note: Plaintiffs appealed to the Court of Appeals for the Second Circuit, which affirmed the district court's dismissal in an unpublished opinion on February 18, 2014. *Doe v. De Leon*, --- Fed.Appx. ----, 2014 WL 591167 (2d Cir.).

* * * *

Turning to the instant action, the United States submitted the Suggestion of Immunity, taking the position that the ISI was immune from suit (Stmt. at 2-6). The United States also took the position that defendants Pasha and Taj, former Directors General of the ISI, are immune pursuant to the common law of foreign sovereign immunity as they were sued in their official capacities for activity arising out of their official duties. (Stmt. at 7-11.)

A. Defendant ISI

Under the FSIA, and the Supreme Court's clarification regarding its breadth, the Court must surrender jurisdiction once the United States has taken the position that a foreign entity is entitled to sovereign immunity and there is no indication that an exception to the FSIA applies. As set forth above, it is the position of the United States that the ISI is entitled to immunity as it is an agency of the government of the Islamic Republic of Pakistan and it performs core investigative and military functions. (Stmt. at 2-6.) The United States further explained that none of the exceptions to the FSIA are applicable to the ISI in these actions. (*Id*.) Plaintiffs have not opposed the United States' position with respect to the ISI, nor have they argued that any of the exceptions to the immunity that the ISI derives from the FSIA are applicable in this action. Based on the pleadings and the record in these actions, the Court is satisfied that the ISI has met its burden under the FSIA and the ISI is entitled to immunity from these actions. *See Gomes v. ANGOP, et al.*, 2012 WL 3637453, at *11 (E.D.N.Y. Aug. 22, 2012) (concluding that various ministries of the government of Angola were immune from suit under the FSIA as those ministries were "organs of the state with core governmental functions" thereby "entitled to the presumption of immunity" and plaintiff failed to establish any exception to the FSIA). Accordingly, the ISI's motion to dismiss the complaint is granted. The complaint against the ISI is dismissed with prejudice.

B. Defendants Pasha and Taj

The remaining issue is whether defendants Pasha and Taj, foreign officials, are immune from these actions. The United States based its position on a detailed analysis of the Complaint conducted by the Department of State. (*See* Letter from Harold Hongju Koh, Department of State, attached as Ex. 1 to Stmt. ("Koh Letter").) The Department of State "determined that former ISI Directors General Pasha and Taj enjoy immunity from suit with respect to this consolidated action." (*Id*. at 2.) In reaching this conclusion, the Department of State explained that:

> [T]he complaint contains largely unspecific and conclusory allegations against the Directors General, and relies centrally on plaintiff's incorrect view that the ISI is not part of the Government of Pakistan. By expressly challenging defendants Pasha's and Taj's exercise of their official powers as Directors General of the ISI, plaintiff's claims challenge defendants Pasha's and Taj's exercise of their official powers as officials of the Government of Pakistan. The complaint expressly refers not to any private conduct by defendants, but only to Pasha's and Taj's actions as Directors General of the ISI. All of their allegations in the Complaint are bound up with plaintiff's claims that the former Directors General were in full command and control of the ISI and allegedly acted entirely within that official capacity. The plaintiffs repeatedly assert that the former Directors General 'exerted full command and control' over the ISI. Compl. ¶ 37. On their

> face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity, and plaintiffs have provided no reason to question that determination.

(*Id*. at 1-2.)

As a preliminary matter, it was implicit in Plaintiffs' earlier filings that the Statement of Interest would be dispositive on the issue of sovereign immunity. The Plaintiffs described the United States' potential opinion as "critical" and "highly probative" on the issue of immunity. (Pls.' Opp'n at 11-16.) Plaintiffs further urged this Court to defer its ruling on the Moving Defendants' motion until the United States had the opportunity to submit a statement. (*Id*. at 2-3.) Consequently, the Court issued an order staying the case and requesting that the United States submit a statement. Understandably, Plaintiffs now seek to distance themselves from the Statement of Interest, which is unfavorable to the survival of their claims. However, given Plaintiffs' prior position in this case, the Court would be justified in deeming Plaintiff's current arguments against the United States' position as waived. Nonetheless, the Court addresses below the merits of Plaintiffs' contention that Pasha and Taj are not entitled to foreign official immunity.

It is the position of the Executive Branch that defendants Pasha and Taj, former Directors General of the ISI, are entitled to foreign sovereign immunity under the common law as foreign officials who were sued in their official capacity for acts conducted in their official capacity. Under the common law on sovereign immunity, the Court's inquiry ends here. *See Matar v. Dichter*, 563 F. 3d 9, 14 (2d Cir. 2009) (affirming dismissal of a suit against a former head of the Israeli Security Agency for whom the United States submitted a Suggestion of Immunity as the official was "immune from suit under common-law principles that pre-date, and survive, the enactment of [the FSIA]").

Plaintiffs argue that the United States' determination as to defendants Pasha and Taj is not controlling. Plaintiffs contend that courts should afford a different level of deference to the United States' determinations depending upon whether individual defendants are shielded from civil liability under head of state or foreign official immunity. Plaintiffs do not appear to question the well settled authority that courts should afford "absolute deference" to the United States' determination that an individual defendant is protected from civil suit by head of state immunity. (Pls.' Resp. at 2.) As Plaintiffs recognize, it is the province of the Executive Branch to determine whether an individual is entitled to immunity as a sitting head of state because that determination "rests on a defendant's status as the representative of the sovereign." (*Id*. at 2 n.1.) However, Plaintiffs maintain that "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity" as such immunity derives from the official's specific conduct at issue on behalf of the sovereign and not the individual's status as the sovereign. (*Id*. at 2 (quoting *Yousuf v. Samantar*, 699 F. 3d 763, 773 (4th Cir. 2012).)

In making this status and conduct based distinction with respect to foreign official immunity, Plaintiffs posit that, when a foreign official, who is only entitled to conduct based immunity, violates a *jus cogens* norm of customary international law, the foreign official is not acting in official or state capacity, as no state has the authority to engage in such conduct. (Pls.' Resp. at 2-5.) According to Plaintiffs, Pasha and Taj are not immune from these actions because their specific acts at issue—their alleged involvement in terroristic acts and summary executions of civilians—are classic examples of *jus cogens* violations and, because they are foreign officials

and not sitting heads of state, the court is free to make its own determination as to whether they are immune. (*Id*. at 2.)

Plaintiffs' proposed conduct and status based distinction is a complicated and novel issue of law. Indeed, as set forth more fully below, a circuit split has emerged. The Fourth Circuit recently noted that "[t]here has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms . . . ." *Id*. at 776. "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims." *Id*. (summarizing cases). The Fourth Circuit concluded that, "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id*. at 777-78 (denying former foreign official's motion to dismiss based on foreign official sovereign immunity "[b]ecause this case involves acts that violated *jus cogens norms* . . . we conclude that [the foreign official] is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law").

However, the exception to foreign official immunity that the Fourth Circuit announced in *Yousuf* is not recognized in this Circuit. Indeed, in *Matar*, the Second Circuit reached the opposite conclusion, holding that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Matar*, 563 F. 3d at 15. In reaching that result, the Second Circuit affirmed its prior holding that there is no *jus cogens* exception to the FSIA, *see Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F. 3d 239, 242-45 (2d Cir. 1996) (rejecting the argument that "a foreign state should be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards"), and further expanded upon that holding to reject such an exception to the common law on foreign official immunity. *Matar*, 563 F. 3d at 14-15.

While the Fourth Circuit's approach would allow Plaintiffs to proceed to the merits of their claims, rather than succumbing to dismissal on a procedural ground, this Court is bound by the law of this Circuit. Moreover, it is uncertain whether *Yousuf* will have enduring precedential value in the Fourth Circuit, as the defendant in that case, who was denied foreign official immunity, has a petition for a writ of certiorari pending before the Supreme Court. *See* Petition for Writ of Certiorari, *Samantar v. Yousuf*, No. 12-1078, 2013 WL 836952 (Mar. 4, 2013). Accordingly, the claims against Pasha and Taj are dismissed without prejudice. If the Supreme Court grants certiorari in *Samantar v. Yousuf*, and affirms the Fourth Circuit's exception to foreign official immunity, Plaintiffs may move to reinstate their claims against defendants Pasha and Taj.

* * * *

C. HEAD OF STATE IMMUNITY

President Rajapaksa of Sri Lanka

On March 29, 2013, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal on immunity grounds of a civil suit against the sitting president of Sri Lanka. *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013). The United States had filed a suggestion of immunity in the district court and an *amicus* brief in the court of appeals in 2012. See *Digest 2012* at 336-42. The decision of the court of appeals is excerpted below.

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The plaintiffs have brought civil claims against the sitting president of Sri Lanka under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. Although the defendant maintains that the plaintiffs failed to serve him with process, he appeared before the district court for the limited purpose of requesting the United States' view as to whether he was immune from suit. The United States Department of State filed a Suggestion of Immunity in the district court. Without expressing any opinion regarding the merits of the plaintiffs' claims, the State Department "determined that President Rajapaksa, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status." Suggestion of Immunity at 6 (Jan. 13, 2012) (J.A. 47). The district court then dismissed the plaintiffs' suit.

On appeal, the plaintiffs urge us to reverse the judgment of the district court, contending that the sitting president of Sri Lanka is not immune from civil suit under the TVPA. We disagree.

As the Supreme Court has held, "[t]he doctrine of foreign sovereign immunity developed as a matter of common law." *Samantar v. Yousuf*, ––U.S. ––––, ––––, 130 S.Ct. 2278, 2284, 176 L.Ed.2d 1047 (2010). In *Samantar*, the Court explained that "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity," and that "the same two-step procedure was typically followed when a foreign official asserted immunity." *Id.* at 2284–85. Under the first step of that procedure, the only one that is relevant here, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department," and "[i]f the request was granted, the district court surrendered its jurisdiction." *Id.* at 2284; *accord Habyarimana v. Kagame*, 696 F.3d 1029, 1032–33 (10th Cir.2012); *Matar v. Dichter*, 563 F.3d 9, 13–14 (2d Cir.2009); *Ye v. Zemin*, 383 F.3d 620, 625–27 (7th Cir.2004); *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir.1974); *cf. Republic of Mexico v. Hofman*, 324 U.S. 30, 36, 65 S.Ct. 530, 89 L.Ed. 729 (1945) ("[I]t is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune."). Here, the defendant did request a suggestion of immunity, and the United States granted that request by submitting a suggestion of immunity to the court. Accordingly, as the district court recognized, it was without jurisdiction,

see Saltany v. Reagan, 886 F.2d 438, 441 (D.C.Cir.1989), unless Congress intended the TVPA to supersede the common law.

"The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that," as here, "clearly covers a field formerly governed by the common law." *Samantar*, 130 S.Ct. at 2289. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)). Whether or not legislative history would be sufficient to satisfy the requirement of speaking "directly," the plaintiffs' view is that the legislative history of the TVPA is ambiguous on the subject of head of state immunity. In fact, if anything the legislative history appears to indicate that Congress expected the common law of head of state immunity to apply in TVPA suits. *See* H.R. REP. NO. 102–367, at 5 (1991) ("[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity.").

This leaves only the language of the TVPA, which the plaintiffs contend supersedes the common law because it renders "an individual" liable for damages in a civil action, and a head of state is "an individual." But as even the plaintiffs acknowledge, the term "an individual" cannot be read to cover every individual; plaintiffs agree that both diplomats and visiting heads of state retain immunity when they visit the United States. Oral Arg. Recording at 33:19–34:04. Indeed, although the most analogous statute, 42 U.S.C. § 1983, provides a cause of action against *"[e]very* person" who deprives another of his or her Constitutional rights under color of state law, *id.* (emphasis added), the Court has held that Congress did not intend that language to abrogate the preexisting common law of immunity applicable to executive officials. *See Malley v. Briggs*, 475 U.S. 335, 339–40, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). We likewise conclude that the common law of head of state immunity survived enactment of the TVPA. *Accord Matar*, 563 F.3d at 15; *see Devi v. Rajapaksa*, No. 12–4081 (2d Cir. Jan. 30, 2013) (holding that the defendant, who is the same defendant as in this case, "clearly is entitled to head-of-state immunity").

Because, as a consequence of the State Department's suggestion of immunity, the defendant is entitled to head of state immunity under the common law while he remains in office, and because the TVPA did not abrogate that common law immunity, the judgment of the district court dismissing the plaintiffs' complaint is *affirmed.*

* * * *

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Inviolability of Diplomatic and Consular Premises

See discussion of *Ahmed v. Attorney General of the United States* in section A.1., *supra*, in which the United States filed a motion to clarify or vacate an order of the U.S. District Court for the Northern District of Georgia regarding service of process. The United States' brief explains that an order requiring the U.S. Marshals Service to deliver a summons and complaint to a Nigerian consulate or the Nigerian Embassy would run

contrary to the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations, respectively.

2. AIT-TECRO Agreement on Privileges, Exemptions, and Immunities

On February 4, 2013, the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") signed an agreement on privileges, exemptions, and immunities. The agreement replaces an agreement on privileges, exemptions, and immunities signed in 1980 by AIT and the then-Coordination Council for North American Affairs. The English text of the 2013 agreement between AIT and TECRO is available at *www.ait.org.tw/en/ait-tecro-privileges-and-immunities-agreements.html.*

3. Immunity of Diplomatic Accounts and Personnel

As discussed in Section A.2.b., *supra*, the United States filed an *amicus* brief in the Second Circuit in support of reversal of a district court's order permitting discovery concerning the Lao Government's diplomatic bank accounts and central bank accounts in the United States. *Thai-Lao Lignite and Hongsa Lignite v. Government of the Lao People's Democratic Republic et al.*, No. 13-495 (2d Cir. 2013). As to the diplomatic accounts, the U.S. brief argues that the district court improperly interpreted both the FSIA and the Vienna Convention on Diplomatic Relations ("Vienna Convention" or "VCDR") in concluding that the accounts were subject to discovery and possible attachment under the FSIA because a portion of them was being used for "commercial activities." The U.S. brief identifies provisions in the Vienna Convention that shield these accounts from discovery. Finally, this section of the brief explains that the district court's order would give rise to a host of negative foreign policy consequences. The section of the U.S. brief discussing the diplomatic accounts appears below (with record citations omitted). The section of the brief discussing the accounts of the Central Bank of Laos is excerpted in Section A.2.b., *supra*. The brief in full is available at *www.state.gov/s/l/c8183.htm*.

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A. The VCDR Shields the Lao Government's Diplomatic Accounts from Attachment and Discovery

The VCDR governs the relationship between a sending state (here, Laos) and receiving state (here, the United States) with respect to the operation of the sending state's diplomatic mission, and affords certain privileges and immunities to embassies and diplomatic agents. These protections also extend to U.N. missions. *See* Agreement Between the United Nations and the

United States Regarding the Headquarters of the United Nations, art. V, § 15, June 26, 1947, T.I.A.S. 1676 (U.N. representatives will be entitled to the same privileges and immunities as the United States accords to diplomatic envoys); Convention on Privileges and Immunities of the United Nations, art. IV, § 11(g) (member state representatives to the U.N. will receive the same privileges and immunities as diplomatic envoys); *accord 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 298 (2d Cir. 1993) (applying VCDR to define protection afforded to U.N. permanent mission). In particular, as relevant here, the Lao Government's diplomatic bank accounts, both its embassy and U.N. mission bank accounts, are entitled to the protections set forth in the VCDR. These protections shield the accounts from attachment and discovery.

The district court offered two rationales in support of its holding that the VCDR did not preclude discovery on the Lao Government's diplomatic accounts. First, the district court concluded that the funds might be subject to attachment (and thus also to discovery) because they were used for commercial activities. Second, applying the FSIA analysis in *EM Ltd.* to the VCDR context, the district court concluded that the fact that the diplomatic accounts might be immune from attachment did not render them immune from discovery. Both rationales are erroneous.

1. The VCDR Protects Diplomatic Property Used for Commercial Transactions That Are Related to Diplomatic Functions

The district court's characterization of the Lao Government's diplomatic accounts as being used for commercial activities, and thus subject to potential attachment, substitutes the scope of protection afforded by the FSIA for the distinct protections provided by the VCDR. Under the FSIA, the property of a foreign state may be subject to attachment or execution to satisfy a judgment if the property is both "in the United States" and "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). But Congress enacted the FSIA "[s]ubject to existing international agreements to which the United States is a party," 28 U.S.C. § 1609, and the FSIA therefore does not circumscribe the broad protections and immunities conferred by the VCDR, *see* H.R. Rep. No. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (FSIA is "not intended to affect either diplomatic or consular immunity"); *id.* at 23 (noting that, even following the enactment of the FSIA, "if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply"). Put simply, the FSIA exceptions to immunity from attachment are "inapplicab[le]" to an analysis of the validity of attachment where an international agreement such as the VCDR provides immunity. *767 Third Ave. Assocs.*, 988 F.2d at 297.

Under Article 25 of the VCDR, "[t]he receiving State shall accord full facilities for the performance of the functions of the mission." Accordingly, the standard for determining whether a diplomatic bank account is immune from attachment under the VCDR is not whether that account is used for commercial activities, but rather whether such immunity is necessary to ensure the "full facilities" to which the diplomatic mission of the sending state is entitled. VCDR, art. 25; *see also id.*, Preamble (explaining that the privileges and immunities conveyed by the VCDR are meant "to ensure the efficient performance of the functions of diplomatic missions"). Although no appellate court has reached this question, numerous district courts (most of which are in this Circuit) have concluded that according "full facilities" to a diplomatic mission includes providing immunity from execution or attachment on embassy or mission bank accounts that are used for diplomatic purposes, because such bank accounts are critical to the functioning of a diplomatic mission. *See, e.g., Avelar v. J. Cotoia Const., Inc.*, 11-CV-2172

(RMM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) ("Bank accounts used for diplomatic purposes are immune from execution under [Article 25], as facilities necessary for the mission to function."); *Sales v. Republic of Uganda*, 90 Civ. 3972 (CSH), 1993 WL 437762, at *1(S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes."); *Foxworth v. Perm. Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992) (holding that "attachment of defendant's bank account is in violation of the United Nations Charter and the [VCDR] because it would force defendant to cease operations"); *Liberian Eastern Timber Corp. v. Gov't of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) ("The Liberian Embassy lacks the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission.").

Indeed, the VCDR acknowledges that diplomatic staff will engage in commercial activities as part of their official duties without losing immunity for such activities. *See* VCDR, art. 31(1)(c) (providing that a diplomatic agent shall be immune from the civil jurisdiction of the receiving state "except in the case of…an action relating to any…commercial activity exercised by the diplomatic agent in the receiving State *outside his official functions*" (emphasis added)); *Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) ("commercial activity" refers to "the pursuit of trade or business activity" unrelated to diplomatic mission); *Swarna v. Al-Awadi*, 622 F.3d 123, 139 (2d Cir. 2010) ("*Tabion* articulates the scope of acts as they relate to the term 'commercial activity' under Article 31(1)(c) for sitting diplomats."). Clearly, to the extent the Lao Government uses its diplomatic accounts to purchase office supplies and telephone and internet services, as well as to pay rent on the facilities that house its embassy and U.N. mission, such use is not commercial activity outside the official functions of the diplomatic staff, but rather is in connection with the performance of the functions of the mission.

Thus, absent evidence that the accounts were being used for activities unrelated to the Lao Government's diplomatic mission, there was no basis for the district court to conclude that the diplomatic accounts were arguably exempt from the VCDR's immunity provisions. Courts that have addressed the "full facilities" provision of VCDR Article 25 have routinely relied on sworn affidavits submitted by mission officials attesting that the accounts at issue were used for the functioning of the mission. *See, e.g.*, *Avelar*, 2011 WL 5245206, at *4 ("A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes."); *Sales*, 1993 WL 437762, at *2 (reliance on mission head's affidavit, rather than "painstaking examination of the Mission's budget and books of account," is consistent with principle of diplomatic immunity); *Foxworth*, 796 F. Supp. at 762 (relying on declaration to describe nature and purpose of accounts); *Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 (same). Here, the Thongmoon Declaration submitted by the Lao Government was more than sufficient to establish the diplomatic nature of the accounts. As the magistrate judge observed in her November 26, 2012 order, the Thongmoon Declaration "states that the accounts in question are used for the purpose of maintaining the diplomatic functions of the Embassy and Mission, that any commercial transactions with third parties reflected in account statements were ancillary to that purpose, and that it would be 'difficult, and perhaps impossible' for the Embassy and Mission to function if the accounts were under threat of attachment." The district court credited the magistrate judge's summary of the Thongmoon Declaration'scontents, including Mr. Thongmoon's assertion of the substantial difficulties that the threat of attachment would place on the diplomatic mission's ability to function. Accordingly, the Thongmoon Declaration should

have foreclosed any discussion of the "commercial" nature of the Lao Government's diplomatic accounts. Applying the appropriate VCDR standard, the accounts are entitled to immunity.

2. The VCDR Immunizes a Foreign Mission from Discovery and Precludes Testimony from Diplomatic Agents and Staff

The district court's conclusion that the Lao Government is subject to discovery regarding its embassy and U.N. mission accounts even if those accounts might be immune from attachment is likewise mistaken. In its opinion, the district court noted that "the concerns animating the Second Circuit's opinion in *EM* seem equally applicable in this context: once the Court has established jurisdiction over a foreign sovereign, the Court may order discovery as it would over any other defendant." But there is no basis for extending *EM Ltd.*'s holding to discovery relating to diplomatic property that is otherwise protected by the VCDR. At the threshold, as discussed above, the FSIA does not circumscribe the protections afforded by the VCDR. Moreover, the Court's holding in *EM Ltd.* rested on its determination that postjudgment discovery did not implicate the FSIA because it did not affect the foreign state's immunity from attachment. 695 F.3d at 208. Thus, once subject matter jurisdiction was established under the FSIA, a district court "could exercise its judicial power over [the foreign state] as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules." *Id.* at 209.

There are several provisions of the VCDR, however, that provide immunity from the types of discovery allowed by the district court in this case. *Cf. Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 n.5 (in light of the VCDR's provisions, it would be "a difficult task at best" to obtain discovery regarding diplomatic accounts). VCDR Article 31 provides that diplomatic agents "enjoy immunity from [the receiving state's] civil and administrative jurisdiction" and may not be compelled "to give evidence as [ ] witness[es]." Indeed, under Article 31, "[s]itting diplomats are accorded near-absolute immunity in the receiving state to avoid interference with the diplomat's service for his or her government." *Swarna*, 622 F.3d at 137. VCDR Article 37 extends those same protections to administrative and technical staff, who are immune from the receiving state's civil jurisdiction for acts performed within "the course of their duties," and may not be compelled to give evidence as witnesses. *See Vulcan Iron Works, Inc. v. Polish Am. Machinery Corp.*, 472 F. Supp. 77, 79-80 (S.D.N.Y. 1979) (VCDR protects administrative and technical staff, and "[t]hus, their failure to appear for depositions in response to the plaintiffs' subpoenas was excusable"). Thai-Lao and Hongsa's attempts to compel deposition testimony from Lao diplomats, or administrative and technical staff of the Lao embassy, are in direct conflict with VCDR articles 31 and 37.

Additionally, VCDR Article 24 provides that the archives and documents of the mission are "inviolable." According to a leading diplomatic law expert, "the expression 'inviolable' was deliberately chosen by the International Law Commission to convey both that the receiving State must abstain from any interference through its own authorities and that it owes a duty of protection of the archives in respect of unauthorized interference by others." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 192 (3d ed. 2008); *see also 767 Third Ave. Assocs.*, 988 F.2d at 300 (concluding that the VCDR "was intended to and did provide for the inviolability of mission premises, archives documents, and official correspondence," and that the VCDR "recognized no exceptions to mission inviolability"). Compelled production of financial and operational records from the Lao Government's embassy and U.N. mission conflicts with this provision; so too would compelled production of documents more recently sought by Thai-Lao and Hongsa, such as written reports

prepared by the embassy and U.N. mission for the Lao Government concerning finances and accounts, and yearly proposals made to the Lao Government for funding.

Similarly, VCDR Article 27 provides for the inviolability of official correspondence of the mission. Insofar as the discovery sought by Thai-Lao and Hongsa seeks correspondence concerning diplomatic funds between the embassy and U.N. mission and the Lao Government, it could compromise the ability of the embassy and U.N. mission to carry out their functions in confidence, thus implicating the United States' obligation to "permit and protect free communication on the part of the mission for all official purposes" and to ensure the inviolability of the mission's official correspondence. VCDR, art. 27(1)-(2); *see also* Denza, Diplomatic Law at 211 ("Free and secret communication between a diplomatic mission and its sending government is from the point of view of its effective operation probably the most important of all the privileges and immunities accorded under international diplomatic law."). The district court's perfunctory rejection of the VCDR as a basis for immunity from discovery failed to account for these provisions, instead employing a commercial activity test that has no applicability and that led to an incorrect result.

The Court should defer to the Executive Branch's interpretation of the VCDR. *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (citation and internal quotation marks omitted)). That is particularly true where, as here, the Executive's interpretation of the VCDR is agreed to by other parties to the treaty—in this case, the Lao Government—and flows from the treaty's clear language. *See id.* at 1993-95; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); ….

B. The District Court's Order Would Have an Adverse Effect on the United States' Foreign Policy

The district court's February 11, 2013 order would have several adverse consequences for U.S. foreign policy. For example, by subjecting the property of diplomatic missions to wide-ranging discovery and the threat of potential attachment, the district court's order makes it exceedingly difficult for those missions to plan for and carry out their day-to-day operations, thereby straining the United States' bilateral relationships and its relationships with the U.N. and its member state missions.

Moreover, the United States has a strong interest in promoting reciprocity with respect to the treatment of its own diplomatic missions abroad. *See Boos v. Barry*, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity "ensures that similar protections will be accorded those that we send abroad to represent the United States"). Applied reciprocally, the district court's order would permit discovery into (and foreign judicial scrutiny of) sensitive communications discussing operational details of the United States' foreign missions, as well as the compulsion of testimony from United States diplomats and other diplomatic staff overseas, all of which the United States would vigorously oppose. The unique nature of U.S. discovery counsels in favor of U.S. courts treading carefully in this area, where the United States typically is not subject to this kind of judicial action abroad. The Executive Branch's assessment of the foreign policy consequences of the district court's February 11, 2013 order is entitled to deference. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 261 n.9 (2d Cir. 2007).

* * * *

E. INTERNATIONAL ORGANIZATIONS

United Nations

In 2013, the United States filed a statement of interest in a case brought in U.S. District Court for the District of Columbia against U.S. Permanent Representative to the UN Susan Rice,[***] the UN, and the UN Development Program ("UNDP") alleging breach of contract, fraud, and harassment relating to plaintiff's failure to secure a position with UN Volunteers ("UNV") in Laos after allegedly being offered the job. *Lempert v. Rice et al.*, No. 12-01518 (D. D.C. 2013). The U.S. asserted absolute immunity for the UN and the UNDP in its statement of interest, filed on May 3, 2013, which is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.

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I. THE UN IS ABSOLUTELY IMMUNE FROM SUIT UNDER THE CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS.

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art 105.1. The Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946 21 U.S.T. 1418, 1 U.N.T.S. 16 ("General Convention"), adopted by the UN shortly after the UN Charter, defines the UN's privileges and immunities by providing that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, sec. 2.

The United States understands this provision to mean what it unambiguously says: the UN, including its integral component the UNDP, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. Here, the UN has not expressly waived its immunity. On the contrary, it has expressly invoked its immunity and has requested the United States to take appropriate steps to protect its privileges and immunity from suit. *See* February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to plaintiff's lawsuit, and that "we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action."). To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the Executive Branch's interpretation that the UN is immune from suit here. *See Kolovrat v.Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves,the meaning

[***] Editor's Note: Susan Rice left her post as U.S. Ambassador to the UN on June 25, 2013 to become National Security Adviser to President Obama. On August 5, 2013 Samantha Power was sworn in as U.S. Ambassador to the UN.

given them by the departments of government particularly charged with theirnegotiation and enforcement is given great weight").

* * * *

Therefore, because the General Convention provides for the UN to be immune in a suit such as this one, and because the UN has not waived its immunity, the Court lacks jurisdiction over plaintiff's claims against the UN Defendants.

II. THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT DOES NOT AUTHORIZE THE UNITED STATES TO WAIVE THE IMMUNITY OF THE UN.

Plaintiff alleges that the International Organizations Immunities Act of 1945 ("IOIA"), 22 U.S.C. §§ 288 *et seq*., provides jurisdiction over his claims against the UN Defendants and that it authorizes the United States to waive the UN's immunity from suit. *See* Compl. ¶¶ 2, 6, 48. Plaintiff's position is without merit, because the IOIA neither requires nor authorizes the United States to waive the immunity of the UN.

* * * *

The plaintiff filed an opposition to the U.S. statement of interest, to which the United States replied on June 10, 2013. Excerpts from the U.S. reply brief follow (with footnotes omitted). The U.S. reply is also available at www.state.gov/s/l/c8183.htm.

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I. The UN Is Immune From "Every Form of Legal Process" Under the General Convention Unless The UN Itself Expressly Waives Its Own Immunity.

Plaintiff repeatedly, and mistakenly, argues that the UN's immunity is qualified, and further that the UN has somehow impliedly or constructively waived its immunity. *See, e.g.*, Opp. to SOI at 6, 13. That is not the case. The Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946 21 U.S.T. 1418, 1 U.N.T.S. 16 ("General Convention"), plainly states that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, sec. 2 (emphasis added). The U.S. Government and an unbroken line of U.S. judicial decisions have interpreted this language to mean precisely what it says: namely, that the UN, including the UNDP, is absolutely immune from all legal process unless the UN, and the UN alone, "expressly" waives its immunity in a particular case. *See Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y. 1987) ("Under the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."); *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008) ("[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction."), *aff'd, Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010); *Sadikoglu v. UN Development Programme*, No. 11-Civ-0294 (PKC), 2011

WL 4953994 at * 3 (S.D.N.Y. Oct. 14, 2011) (ruling that "because UNDP — as a subsidiary program of the UN that reports directly to the General Assembly — has not waived its immunity," the General Convention "mandates dismissal . . . for lack of subject matter jurisdiction"); *see also* SOI at 4-5. Therefore, because the UN has not waived its immunity, Plaintiff's suit against the UN should be dismissed.

Ignoring the clear language of Article II, Section 2 of the General Convention, Plaintiff contends that the General Convention provides only qualified immunity for the UN. *See, e.g.*, Response to SOI at 12; Opp. to MTD at 22-23. Specifically, he argues that, pursuant to Section 29 of the General Convention, the UN's alleged failure to provide an adequate settlement mechanism for his contract dispute has resulted in a constructive waiver of the UN's immunity. *Id*. Plaintiff is mistaken. Section 29 merely requires the UN to "make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." General Convention, art. VIII, sec. 29(a). "[N]othing in this section," however, "or any other portion of the [General Convention] refers to or limits the UN's absolute grant of immunity as defined in article II [of the General Convention] — expressly or otherwise." *Sadikoglu*, 2011 WL 4953994 at *5. For this reason, the United States District Court for the Southern District of New York ruled in the *Sadikoglu* case, which also involved a contract dispute, that "any purported failure of UNDP to submit to arbitration or settlement proceedings does not constitute a waiver of its immunity." *Id*. Similarly, the Second Circuit in *Brzak* rejected the argument "that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of [ ] immunity[;] crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. As these decisions demonstrate, when the UN does not expressly waive its own immunity in a particular case, as it has not done here, then it is immune under the General Convention "from every form of legal process[,]" General Convention, art. II, sec. 2, including this lawsuit. In any event, the fact that Plaintiff has not been able to resolve his dispute with the UN does not establish that the UN's dispute resolution mechanisms are inadequate. Further, the UN has stated that it has had extensive discussion with Plaintiff concerning his grievances and remains open to continued discussions. *See* February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A).

Plaintiff incorrectly asserts that the Secretary-General has a duty to waive the UN's immunity under the General Convention. Opp. to MTD at 24-25; Resp. to SOI at 11. In support, he quotes from Article 20 of the General Convention, which states that the Secretary-General "shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." Resp. to SOI at 11 (quoting General Convention, art. V, sec. 20). This section addresses the Secretary-General's authority to waive the immunity of UN officials, rather than the UN itself, and is clearly discretionary.

II. Because The UN Is Immune, Plaintiff Is Mistaken That The UN Is Required To Submit To Service Of Process, Answer Plaintiff's Complaint Or Provide Sworn Testimony.

Plaintiff argues that the UN has failed to provide "good cause" for refusing to submit to service of process, Resp. to SOI at 9, and that the UN is obligated to answer his Complaint and provide sworn testimony in response to his allegations, *id*. at 7-8. Plaintiff's position is at odds with every U.S. judicial decision addressing the UN's immunity under the General Convention.

The General Convention's extension of the UN's immunity to "every form of legal process" quite clearly includes service of process. *See Askir v. Boutros-Ghali*, 933 F. Supp. 368, 369 (S.D.N.Y. 1996) (dismissing suit against UN on the basis of immunity where plaintiff sought an order directing the U.S. Marshal to serve the UN). Nor is there any requirement for the UN to answer Plaintiff's Complaint, provide sworn testimony, or take any other affirmative steps in order to enjoy immunity from suit. Under Article II, Section 2 of the General Convention, unless the UN affirmatively waives its immunity from suit in a particular case, it is absolutely immune. Here, there are no allegations and no evidence whatsoever that the UN has waived its immunity. *See, e.g., De Luca v. United Nations Org.*, 841 F. Supp. 531, 533 (S.D.N.Y.1994) ("Plaintiff has not alleged that the U.N. has expressly waived its immunity in this instance and no evidence presented in this case so suggests. Finding the U.N. to be immune from plaintiff's claims, we dismiss them.").

Furthermore, the United Nations in fact has expressly invoked its immunity and has requested that the United States take steps to protect its immunity in this litigation. *See* SOI at 4 (citing February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to plaintiff's lawsuit, and that "we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action.")). Because the UN has not expressly waived its immunity, but, to the contrary, has expressly invoked its immunity, dismissal is clearly warranted. *See Brzak*, 551 F. Supp. 2d at 318 ("[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction.").

III. Plaintiff Is Wrong That The UN's Immunity Is Governed By The International Organizations Immunities Act, Or That This Statute Incorporates A "Commercial Activities Exception" to Immunity.

Plaintiff argues that the UN's immunity is governed by the International Organizations Immunities Act of 1945 ("IOIA), 22 U.S.C. §§ 288 *et seq*., and that this statute, through the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq*., creates a "commercial activities exception" that precludes the UN from enjoying immunity in a contract dispute. *See* Resp. to SOI at 9-10; Opp. to MTD at 25-26. This argument is wrong for at least two reasons. First, as the United States explained in its Statement of Interest, the UN is immune pursuant to the General Convention; therefore, its immunity from suit is not dependent upon any immunity that may also be provided by the IOIA. *See* SOI at 6 (citing *Brzak*, 597 F.3d at 112) ("[W]hatever immunities are possessed by other organizations [under the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception."); *Sadikoglu*, 2011 WL 4953994 at *4 (rejecting argument that the IOIA limits the immunity of the UNDP because the UNDP's immunity derives from the General Convention). This is a clear case of the specific applicability of the General Convention to the UN trumping the general applicability of the IOIA to international organizations.

Second, the D.C. Circuit has squarely rejected the argument that the IOIA incorporates a commercial activities exception to immunity. *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340-1 (D.C. Cir. 1998). In *Atkinson*, the Court held that the immunity provided by the IOIA is "absolute" and subject only to limitation by Executive Order. *Id*. at 1341. In short, the D.C. Circuit has determined that the IOIA does not incorporate a commercial activities

exception; moreover, that question has no bearing on whether the UN is immune under the General Convention, which it clearly is given the lack of an express waiver by the UN.
The cases cited by Plaintiff fail to support his claim that the UN is not immune in cases involving commercial disputes. Specifically, he cites a D.C. Circuit decision that addressed whether the International Finance Organization was immune under the IOIA, where the organization expressly waived its immunity from suit in its charter document. Resp. to SOI at 15 (citing *Osseiran v. International Finance Corp.*, 552 F.3d 836, 838-39 (D.C. Cir. 2009)). This case did not address and has no relevance to whether the UN is immune under the General Convention. Plaintiff also relies on a Third Circuit decision holding that the IOIA, via the FSIA, incorporates a commercial activities exception to immunity. Resp. to SOI at 15 (citing *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 766 (3rd Cir. 2010)). Not only is this ruling directly contrary to the D.C. Circuit's *Atkinson* decision, 156 F.3d at 1341, *see supra*, the case did not address nor did it imply that the UN's immunity is anything but absolute under the General Convention.

In contrast to Plaintiff's arguments to the contrary, the United States has offered clear support in its Statement of Interest for the proposition that the UN is immune under the General Convention in all classes of cases, including breach of contract claims. *See* SOI at 5-6 (citing *Sadikoglu*, 2011 WL 4953994 at *2-3 (finding UNDP immune under General Convention with respect to breach of contract claim)).

Plaintiff also erroneously argues that, because the President may waive an international organization's immunity under the IOIA, Ambassador Rice has the power to waiver the UN's immunity. Opp. to MTD at 20-21. Again, this argument fails to recognize that the UN is immune pursuant to the General Convention, and that under the General Convention only the UN may waive its own immunity. General Convention, art. II, sec. 2.

IV. The UN Is Not Subject To The Due Process Requirements Of The United States Constitution.

Finally, Plaintiff claims that the UN does not enjoy immunity from suit because he has alleged that he is entitled under the Due Process Clause of the Fifth or Fourteenth Amendments to have his claims against the UN heard. *See, e.g.*, Resp. to SOI at 8. Unsurprisingly, Plaintiff offers no authority or case law in support of his claim. It is beyond dispute that the United Nations is not subject to the due process requirements of the United States Constitution. *See, e.g., McGehee v. Albright*, 210 F. Supp. 2d 210, 216 n.4 (S.D.N.Y. 1999) (noting that the United Nations "is not subject to the due process requirements of the United States Constitution"). Moreover, to the extent Plaintiff is arguing that the UN's immunity from suit violates his right to due process, that argument was rejected conclusively in *Brzak*, where the Second Circuit stated, with equal applicability here: "If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution." 597 F.3d at 114. Therefore, absent an express waiver in a particular case, the UN is immune from all lawsuits in U.S. Courts, presenting any type of legal claim, including claims purportedly brought under the Constitution.

* * * *

The court granted defendants' motion to dismiss in a July 19, 2013 opinion and order. The section of the opinion relating to the UN defendants is excerpted below.

* * * *

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." UN Charter art. 105, para. 1. The Convention on Privileges and Immunities of the United Nations (the "General Convention"), which was adopted by the UN shortly after the UN Charter and which the United States has ratified, defines the UN's privileges and immunities by providing that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from *every form of legal process* except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, sec. 2 (emphasis added). Several federal courts that have addressed the issue have relied on the General Convention in recognizing the UN's absolute immunity from suit absent an express waiver by the UN. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010); *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994).

In this case, the UN has not expressly waived its immunity. To the contrary, it has affirmatively requested that the United States take steps to protect its privileges and immunities in this case. *See* Gov't Stmt. of Interest, Ex. A (Feb. 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Rice) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to Plaintiff's lawsuit, and that "we respectfully request that the Government of the United States to take appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action."). Accordingly, under the plain language of the General Convention, the UN is immune from all legal process, including suit, and the Court therefore lacks subject matter jurisdiction over Plaintiff's claims against it. Further, the Court concludes that as a subsidiary program of the UN that reports directly to the General Assembly, the UNDP also enjoys immunity under the Convention and therefore Plaintiff's claims against it must also be dismissed for lack of subject matter jurisdiction. *See Sadikoglu v. United Nations Dev. Programme*, Civ. A. No. 11-0294 (PKC), 2011 WL 4953994 at *3 (S.D.N.Y. Oct. 14, 2011).

This conclusion is further supported by the International Organizations Immunity Act of 1945 ("IOIA"), 22 U.S.C. § 288a(b), which similarly provides that international organizations designated by the President "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." The UN has been so designated. *See* Exec. Order 9698, 11 Fed. Reg. 1809 (Feb. 20, 1946).

Plaintiff asserts several arguments as to why the United Nations is not entitled to absolute immunity from legal process—none of which the Court finds availing. For instance, Plaintiff argues that even where an international organization such as the UN asserts immunity, the organization should nevertheless be required to at the very least submit to service and answer Plaintiff's Complaint "in order to protect the [c]onstitutional due process rights of Plaintiff." Pl.'s Response to Gov't Stmt. of Interest at 7. *See also id*. at 12 (seeming to argue that the UN

has impliedly waived its immunity by failing to provide an adequate settlement mechanism for his contract dispute in violation of his due process rights and the UN's own obligations under the General Convention); *id*. at 11 (arguing that the Secretary-General has a duty to waive immunity in cases where such is necessary to protect an individual's fundamental rights).

These arguments need not detain the Court long, as Plaintiff points to no authority supporting his assertion that the immunity "from every form of legal process" conferred upon the UN by the General Convention is anything but absolute absent express waiver, and the Court is aware of none. To the contrary, at least one Circuit to address the issue has firmly rejected Plaintiff's approach. *See Brzak*, 597 F.3d at 114 ("The short-and conclusive-answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law. . . . If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution.").

Additionally, Plaintiff appears to argue that the IOIA no longer confers absolute immunity on designated organizations in all cases because subsequent to the passing of that act, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et. seq.*, which strips foreign sovereigns of their immunity in certain circumstances, including in "any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id*. § 1605(a)(2). While the Court harbors doubt that Plaintiff – who has remained in Laos, *see* Compl. ¶ 73 – has suffered a "direct effect" in the United States resulting from the UN Defendants' alleged misconduct, even assuming that this could be shown, Plaintiff's argument must be rejected for two reasons. First, even if the IOIA does not confer immunity in this case, Plaintiff has provided no explanation as to why the General Convention does not nevertheless serve as an independent source of the UN's absolute immunity. Second, Plaintiff's argument runs directly counter to binding Circuit authority finding that the IOIA does not incorporate the FSIA's commercial activity exception. *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341-42 (D.C. Cir. 1998) ("In light of this text and legislative history [of the IOIA], we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945 – when immunity of foreign sovereigns was absolute. . . . The FSIA is 'beside the point' because it does not 'reflect any direct focus by Congress upon the meaning of the earlier enacted provisions' of the IOIA.") (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237). In view of this binding precedent, Plaintiff's heavy reliance on case law outside of this Circuit is misplaced. *See* Pl.'s Response to Gov't Stmt. of Interest at 15-16 (discussing *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010)).

The Court has considered all other arguments asserted by Plaintiff on this issue and finds them without merit. Accordingly, because the UN Defendants have not expressly waived their immunity to legal process in the instant suit, but, to the contrary, have expressly invoked such immunity, both the General Convention and the IOIA mandate dismissal of Plaintiff's claims against them for lack of subject matter jurisdiction. For the same reason, Plaintiff's request for an order requiring the U.S. Marshals to serve the UN Defendants and to impose sanctions against them for the costs of effectuating service is denied. …

* * * *

Cross References

ICC proceedings against sitting president of Kenya, **Chapter 3.C.2.b.**
Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**
ILC's work on immunity of State officials, **Chapter 7.D.1.**
ILC's draft articles on diplomatic protection, **Chapter 8.A.1.**
Protecting power agreement in the Central African Republic, **Chapter 9.A.**
U.S. recognition of government of Somalia, **Chapter 9.B.1.**